No. 89-159

In The

Supreme Court of the United States

October Term, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

vs.

PARK SHORE MARINA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Issue: THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT MICHIGAN PRODUCT LIABILITY LAW PROVIDES THAT IN THE CASE OF SIMPLE PRODUCTS OR TOOLS THERE IS NO DUTY TO WARN OF KNOWN OR OBVIOUS PRODUCT-CONNECTED DANGERS WHERE THE PRODUCT ITSELF IS NOT DEFECTIVE OR DANGEROUS.

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PRELIMINARY STATEMENT

Respondents Park Shore Marina, John L. Landow, d/b/a Park Shore Marina and Steven M. Palatinas, d/b/a Park Shore Marina respectfully request that this court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

In 1984, Arthur Anderson, Joann Anderson, Gerald Connor and Kathryn Conner (all third party defendants who are not respondents in this case) purchased a cottage on Diamond Lake, Cassoplis, Michigan. The property came with a dock. The dock would be put in the water every spring and removed in the fall.

After purchasing the cottage, Mr. Anderson called Respondent Park Shore Marina and talked with Respondent John Landow. Mr. Landow and Respondent Steven Palatinas are partners doing business as the Park Shore Marina. Mr. Anderson requested the marina install the dock for the season (Landow, at TR 8). This would have been in the spring of 1984.

Mr. Landow refused to install the dock as the wood decking material had rotted and was therefore unsafe (Landow, at TR 9). Mr. Anderson requested a price on new wood decking material. The price was given and accepted (Landow, at TR 8-14). Park Shore Marina ordered the replacement wood decking sections from Respondent Lake Shore Products. Lake Shore Products delivered the replacement decking to Park Shore Marina (Landow, at TR 10-14). The replacement wood decking consisted of eight 3′ x 12′ sections and three 4′ x 10′ sections.

Park Shore Marina put the dock into the water in the spring of 1984 (Landow, at TR 17-19). The eight 3′ x 12′ sections each overlapped the other a foot and thus the dock extended approximately 80′ into the lake. The three 4′ x 10′ sections were placed on the lake end of the dock to form a "L" shape (Landow, at TR 16-25).

Park Shore Marina did not design the dock. It only sold replacement wood deck sections to the property owners. When Park Shore Marina installed the dock, the property owners' existing steel cross members and sleeves were used to support the decking. The steel cross members slid into steel sleeves which were pipes permanently buried in the lake bed. The sleeves remained in the water all year. (Landow, at TR 16-25).

Park Shore Marina removed the wood decking and steel supports in the fall of 1984 and reinstalled the wood decking and supports in the spring of 1985.

In the summer of 1985 Joann Anderson decided to have a party at the cottage for her coworkers. Petitioner Herbert Johnson is a resident of Chicago and is employed by Amtrak in Chicago as a reservations supervisor. Mrs. Anderson in the director of the department in which Petitioner Johnson is employed.

On June 22, 1985 Petitioner Johnson arrived at the party approximately 2:00 PM Michigan time. He claims to have consumed one beer in the car on the way to the party (Johnson, at TR 18). Petitioner Johnson has testified that after his arrival at the party he went fishing, purposely/playfully bumped a child off the dock into the water near the shoreline (Johnson, at TR 50), drank another beer (Johnson, at TR 36) and discussed with Arthur Anderson the feasibility of pushing a particular adult into the water (Johnson, at TR 37, 44). Mr. Johnson then sat on the end of the dock and dangled his feet in the water.

Petitioner Johnson then decided to go swimming. According to Mr. Johnson's testimony, he got to his feet

and went to a ladder which was attached to the end of the dock. He grabbed the ladder and put one foot in the water. Mr. Johnson decided the water was too cold to enter slowly by descending the ladder so he decided to dive into the lake.

Petitioner Johnson walked back to the end of the dock. He states that he bent his knees and crouched to dive. As he did so he noticed Mr. Anderson quickly coming towards him from the left. Due to his earlier conversation with Mr. Anderson about pushing people in the water, Petitioner Johnson believed Anderson was about to push him in. Petitioner Johnson states he was distracted and hurried his dive into the water (Johnson at TR 61-77, 141-142).

Petitioner Johnson claims that he struck his head on the lake bottom and fractured his neck. As a result, he is quadriplegic. It is claimed the depth of the water was less than four (4) foot at the end of the dock.

Petitioner Johnson was transported to a local hospital where a blood alcohol test was performed. His blood alcohol level was tested at .192 (Henry Guzzo, M.D., at TR 13).

Mr. Johnson has testified at deposition that he never checked the depth of the water, did not see the lake bottom, never looked down into the water before he dove and did nothing to determine the depth of the water before his dive (Johnson at TR 78, 82-84, 175, 180). Petitioner Johnson has been swimming and diving since he was 9 or 10 years of age (Johnson, at TR 183-185). Petitioner Johnson admitted at deposition that if he had given

it any thought he knew that he could fracture his neck by diving into shallow water (Johnson, at TR 175-178).

Petitioner filed a product liability action in the United States District Court for the Western District of Michigan. Petitioner alleged that Respondents Park Shore Marina, Palatinas and Landow breached implied warranties and also were negligent. In reality, however, all parties agree that substantively this was a perfectly fine dock. Petitioner's only theory is that warnings should have been posted on the dock.

> "Johnson agrees with Lake Shore Products' first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in which the wood was fastened together, played no role in this accident." (R. 108: Brief by Plaintiff/Petitioner opposing Respondents' motion for summary judgment filed in the trial court at p. 4).

The trial court granted the motions for summary judgment filed by Respondents Park Shore Marina, Landow, Palatinas and Lake Shore Products, Inc. The court granted the motions on two basis: First, the Petitioner was unable to produce any evidence that the Respondents' product, the dock, was a cause of his injuries. Secondly, even assuming the dock caused petitioners injuries, the Respondents had no duty to warn in situations involving know or obvious product-connected dangers where the product itself is not defective or dangerous, i.e. the dock was not defective and the danger of diving into shallow water is well known and obvious.

The Sixth Circuit Court of Appeals affirmed finding that under Michigan law there is no duty to warn of

known or obvious product-connected dangers where the product itself is not defective or dangerous. As there is no dispute that the dock itself was not defective or dangerous (absent the warning) and because the dangers of diving into unknown waters are known and obvious (as Petitioner himself conceded in his deposition testimony) there was no duty by Respondents to warn about the danger.

Petitioner now brings a petition for a writ of certiorari seeking review by this court.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

1. Michigan Product Liability Law provides that in the case of simple products there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. The wood deck sections sold by Respondents was a very simple product. It was simply a wood platform.

Michigan Law was correctly interpreted and applied by the trial court in granting Respondents summary judgment. The Sixth Circuit Court of Appeals correctly interpreted and applied Michigan law in affirming the trial court.

2. Procedural rules for summary judgment were properly followed by the trial court and the Sixth Circuit on appeal. Michigan law provides that the question of duty is one of law for the court to decide. Petitioner was admittedly aware of the possibility of serious injury when diving off a dock into water whose depth is unknown.

The danger of such a dive was obvious. As a matter of law there was no duty to warn Petitioner of this known or obvious product-connected danger.

3. This action does not come within the "special and important reasons" standard for granting the writ of certiorari. This is not a case involving principles, the settlement of which is of importance to the public as distinguished from that of the parties.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT MICHIGAN PRODUCT LIABILITY LAW PROVIDES THAT IN THE CASE OF SIMPLE PRODUCTS OR TOOLS THERE IS NO DUTY TO WARN OF KNOWN OR OBVIOUS PRODUCT-CONNECTED DANGERS WHERE THE PRODUCT ITSELF IS NOT DEFECTIVE OR DANGEROUS.

Petitioner argues the 1982 Michigan Supreme Court Case of *Owens v Allis Chalmers Corp.*, 414 Mich 399, 327 N.W. 2d 222 (1982) completely did away with Michigan law which provides there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. This simply is not the case.

The leading case in Michigan setting forth this rule is *Fisher v Johnson Milk Company, Inc.*, 383 Mich. 158, 174 N.W. 2d 752 (1970). *Fisher* involved a defendant who sold a wire carrier made to carry bottles of milk. The plaintiff dropped the carrier on an icy sidewalk, slipped and fell on the broken glass and was injured.

"There was no inherent, hidden or concealed defect in the wire carrier. Its manner of construction, how the bottles would rest in it, and what might happen if it were dropped, upright, on a hard surface below, with the possibility that the contained bottles might break, was plain enough to be seen by anyone including a patent attorney as well as a milk dealer. There is no duty to warn or protect against dangers obvious to all. *Jamieson v Woodward & Lothrop* (1957), 101 App DC 32 (247 F2d 23). In so holding in support of the trial court's summary judgment for defendant that court said:

"there are * * * on the market vast numbers of potentially dangerous products as to which the manufacturer owes no duty of warning or other protection. The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous' object; but, if a person accidently slips and falls on a pencil point in his pocket , the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly 'inherently dangerous' because they might slip * * *. A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not

require him to warn of such common dangers. *Fisher* at p. 160-161.

* * *

Owens v Allis Chalmers, supra, relied upon by petitioner was decided November 23, 1982. The plaintiffs' husband was killed operating a forklift manufactured by defendant. It was claimed the forklift was improperly designed, was unstable and failed to provide some type of a driver's restraint so the driver would not be thrown out in a rollover. Various possibilities were offered: a cage, seatbelts or various types, a bar, and an encapsulating seat with arms. There would be issues such as cost involved, safety effectiveness, the driver utility of each or any of the devices, the practicality of the design, the ability of the driver to perform necessary work with the devices in place, etc. In other words, *Owens* involved a complicated design for a complicated product. The court indicated the test was whether the risks were unreasonable in light of the foreseeable injuries, i.e. look at the magnitude of the risk and the reasonableness of the proposed design. However, the court explicitly realized that in cases involving simple products the *Fisher* obvious risk test continues to apply:

> "Our Court of Appeals has essentially limited the language in *Fisher* by the fact that *Fisher* involved a simple product or tool. * * * (citations deleted) We believe that such a limitation is proper."
> *Owens* at p. 425.

The court further noted *Owens* was not a "duty to warn case". *Owens* at p. 427.

Obviously, the *Owens* case did not completely do away with the *Fisher* test which indicates there is no duty to warn or protect against dangers which are obvious. Two weeks after *Owens* was decided, the Michigan Supreme Court decided *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W. 2d 814 (December 7, 1982). In *Antcliff* the plaintiff was injured when a powered scaffold on which he was working gave way and he fell to the ground. It was claimed the manufacturer and seller of the scaffold had a duty to instruct or give directions for the safe rigging of the scaffold.

> "In sum, our prior decisions support a policy that a manufacturer's standard of care includes the dissemination of such information, whether styled as warnings or instructions, as is appropriate for the safe use of its product. If warnings or instructions are required, the information provided must be adequate, accurate and effective.
>
> Although this policy has found expression in a variety of contexts, most often involving warnings, it is not limited to warnings. It is broad enough to encompass instructions for use. To conclude otherwise would be to restrict the sweep of the law of negligence in this state.
>
> *This policy has limits. It has been applied in instances where the product itself had dangerous propensities. Out of recognition that the manufacturer's interests are also entitled to protection, this policy has not been applied in situations involving known or obvious product connected dangers where the product itself is not defective or dangerous. Fisher v Johnson Milk Co., Inc.*, 383 Mich 158; 174 N.W.2d 752 (1970) (wire milk bottle carrier). See also, Anno: Products liability-duty to warn, 76

> ALR2d 9, 28-37, and cases cited therein" (Emphasis added.) *Antcliff*, at 638-639.

The scaffold itself was not found to be defective. The plaintiff was charged with full appreciation of the danger of inadequately supporting the scaffold.

> "As a result, the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require Spider to provide instructions for the safe rigging of its product." *Antcliff*, at 639.

In *Michigan Mutual Insurance Company v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985) the Michigan Supreme Court again confirmed the *Fisher* obvious danger test still exists for simple products or tools. However, the *Heatilator* case did not involve an obvious or known danger or a simple tool. It involved a complex prefabricated fireplace with glass doors, various air vents, an inner metal fire chamber and a second and larger outer shell with an inner space designed to keep the outer shell sufficiently cool.

See also *Ross v Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988) where as late as November, 1988 the Michigan Court of Appeals stated:

> "A seller or manufacturer is generally liable in negligence for failure to warn purchasers or users of its product about dangers associated with intended uses and foreseeable misuses. *Antcliff v. State Employees Credit Union*, 414 Mich 624, 637; 327 N.W.2d 814 (1982), reh den 417 Mich 1103 (1983); *Pettis v Nalco Chemical Co.*, 150

> Mich App 294, 301; 388 N.W.2d 343 (1986), lv den 426 Mich 881 (1986). This standard of care includes dissemination of information, either warnings or instructions, as is appropriate for the safe use of the product; such information must be adequate, accurate, and effective. *Pettis, supra,* 392, *However, there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. Antcliff, supra,* p 639. *Whether a manufacturer owes a duty to warn or to instruct is a question of law for the court to decide. Id.,* p 640." *Ross* at 606-607. (Emphasis added.)

Nowhere does a Michigan court restrict this rule to a product distributed only to highly skilled employees charged with particular knowledge of a product. However, the rule does apply equally to a danger obvious to the expert's eye.

Petitioner cites two Michigan Court of Appeals decisions involving swimming pools as standing for the proposition that the *Fisher* test (no duty to warn of a known or obvious danger inherent in a simple tool or product) no longer exists. The cases cited are *Horen v Coleco Industries, Inc.,* 169 Mich. App. 725, 426 N.W.2d 794 (1988) and *Glittenburg v Wilcenski,* 274 Mich. App. 321, 435 N.W.2d 480 (1989). These cases simply are not applicable.

First, a swimming pool is not a simple product. A swimming pool requires grading, necessarily has sides and a bottom, plumbing, concrete, tile, a liner, circulating motor, filter, heater, chemicals and involves intricate design and manufacture.

Park Shore Marina simply provided perfectly fine and simple wood deck sections off of which the Petitioner, with a blood alcohol level of over .19, rushed to dive into the water head first believing his friend was about to push him into the water.

Secondly, a pool manufacturer has control over the depth of the pool. This is part of the pool design. Respondent Park Shore Marina on the other hand had absolutely no control over the depth of Diamond Lake. The lake bottom on which the Plaintiff apparently struck his head, causing the injury, was not part of the product sold by Park Shore Marina.

Furthermore, neither *Horen* nor *Glittenburg* are decisions of the Michigan Supreme Court.

Petitioner cites various cases to support the theory that a manufacturer may have a duty to warn even though a product is perfectly made. These cases do not involve a simple product or tool which is neither defective nor dangerous with a risk known or obvious.

> *Smith v E.R. Squibb and Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476 (1979) involved a decedent who died as a result of an allergic reaction to an x-ray dye.
>
> *Pettis v Nalco Chemical Co.*, 150 Mich. App. 294, 388 N.W.2d 343 (1986) involved a chemical used to coat molds which caused an explosion when contacted by molten steel.
>
> *Thomas v International Harvester, Co.*, 57 Mich. App. 79, 225 N.W.2d 175 (1974) involved a ball-bearing which was made of very hard steel and chipped when struck with a hammer.

> *Hill v Huskey Briquetting, Inc.*, 54 Mich. App. 17, 220 N.W.2d 137 (1974) involved a decedent who was killed by fumes when charcoal briquettes were lit.

Furthermore, these case together with the *Heatilator, Horen* and *Glittenburg* decisions all have something in common which is lacking in Petitioner Johnson's case. The product involved was the proximate cause of the injury. The injury was caused by some element of the product-over which the manufacturer has control and is charged with responsibility. Opposed to all of these cases is the situation of Petitioner Johnson. Petitioner was not struck by the dock, did not slip on the dock or was otherwise injured by the dock or from any by-product of the dock. There is simply no evidence of a causal connection between the dock and his injury. The injury was caused by the shallow depth of Diamond Lake. The lake bottom was not part of this product.

> "Product liability actions grounded in negligence or breach of implied warranty require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury . . . ". *Spencer v Ford Motor Company*, 141 Mich. App. 356, 361, 367 N.W.2d 393 (1985).

To require Respondents, sellers and installers of the decking material, to place a warning sign on the dock would require the paver of the driveway at the cottage to post a sign at the end of the drive stating: "DANGER: DO NOT EXIT DRIVEWAY IN FRONT OF ONCOMING VEHICLE." Michigan law does not require such a warning.

II. PROCEDURAL RULES FOR SUMMARY JUDGMENT WERE PROPERLY FOLLOWED BY THE TRIAL COURT AND THE SIXTH CIRCUIT ON APPEAL.

The theory Petitioner has pursued at the trial level, Court of Appeals and before this Honorable Court has been that Respondents had a duty to post signs on the dock warning of the lake's shallow water.

The question of duty is one of law for the court to decide. *Moning v Alfono*, 400 Mich 425, 254 N.W.2d 759, (1977); *Mach v General Motors Corporation*, 112 Mich. App. 158, 315 N.W.2d 561 (1982); *Antcliff v State Employees Credit Union, supra*.

As stated earlier, as this wood decking material is not defective or dangerous, the manufacturer/seller is not required to warn of situations involving known or obvious product-connected dangers. Reasonable minds could only conclude that there in an obvious danger with diving head first into a lake, the depth of which is unknown. Petitioner Johnson was properly charged with this knowledge. He had been swimming and diving since 9 or 10 years of age. Petitioner admitted at deposition that he never checked the depth of the water, did not see the lake bottom, never looked down into the water before he dove and did nothing to determine the depth of the water before his dive (Johnson, at TR 78, 82-84, 175, 180). Petitioner further admitted that if he had given it any thought he knew that he could fracture his neck diving into the shallow water (Johnson, at TR 175-178).

Petitioner was admittedly aware of the possibility of serious injury when diving off of a dock into water whose

depth was unknown. Furthermore, the danger of such a dive was obvious. As a matter of law, there was no duty to warn Petitioner Johnson or to protect him from the shallow lake bed.

III. THIS ACTION DOES NOT COME WITHIN THE "SPECIAL AND IMPORTANT REASONS" REQUIREMENT SET FORTH IN SUPREME COURT RULE 17 FOR GRANTING REVIEW ON WRIT OF CERTIORARI.

Finally, the petition should be denied based upon Supreme Court Rule 17. This action does not come within the "special and important reasons" requirement for granting the writ of certiorari. The court does not sit to satisfy scholarly interest in intellectually interesting problems nor for the benefit of particular litigants.

* * *

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 Sup. Ct. 614, 619-620 (1955)

Petitioner's argument is without merit and does not meet the Rule 17 threshold.

CONCLUSION

The Sixth Circuit Court of Appeals properly concluded that Respondents had no duty to warn Petitioner about the dangers posed by diving off a dock into shallow water. Respondents Park Shore Marina, Landow and Palatinas respectfully request that the petition for a writ of certiorari be denied and Respondents awarded appropriate damages pursuant to Supreme Court Rule 49.2 on the grounds the instant petition is frivolous.

DATED: August 25, 1989

Respectfully submitted,

JAMES, DARK AND BRILL

By: JOHN C. FISH (P28918)
Attorney for Respondents
Park Shore Marina, Landow
and Palatinas

APPENDIX

LIST OF PARENT COMPANIES SUBSIDIARIES AND AFFILIATES, PURSUANT TO RULE 28.1.

Petitioner Park Shore Marina is not a corporation. It is a partnership wholly owned by Respondents John L. Landow and Steven M. Palatinas.